

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ABDELRAHMAN F. BADER,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 1:18-cv-01367
)	
NAVIENT SOLUTIONS, LLC,)	Hon. Sharon Johnson Coleman
)	
Defendant.)	
_____)	

DEFENDANT NAVIENT SOLUTIONS, LLC'S
NOTICE OF SUPPLEMENTAL AUTHORITY

Defendant Navient Solutions, LLC (“NSL”) respectfully submits this notice to bring to the Court’s attention a recent decision from the Honorable Manish S. Shah of the U.S. District Court for the Northern District of Illinois in *Johnson v. Yahoo!, Inc.*, No. 14 CV 2028, 2018 WL 6426677 (N.D. Ill. Nov. 29, 2018), as well as a recent decision from the Northern District of Iowa in *Thompson-Harbach v. USAA Fed. Savings Bank*, No. 15-CV-2098-CJW-KEM, 2019 WL 148711 (N.D. Iowa, Jan. 9, 2019). Both decisions address a number of legal arguments raised by NSL’s motion for judgment on the pleadings (Dkt. 25), Plaintiff’s response thereto (Dkt. 28), and NSL’s reply in further support of its motion (Dkt. 33). A copy of the *Johnson* and *Thompson-Harbach* decisions are attached as Exhibit A and Exhibit B, respectively.

In *Johnson*, Judge Shah reconsidered his prior denial of the defendant’s motion for summary judgment and entered judgment in defendant’s favor, finding that the text messages to plaintiff were not placed using an automatic telephone dialing system (“ATDS”) as that term is defined under the Telephone Consumer Protection Act (“TCPA”). Like Mr. Bader in this case,

plaintiff in *Johnson* argued that defendant's dialing system—which sent text messages to customers' numbers pulled from a database of stored numbers—qualified as an ATDS under the TCPA. The Court disagreed, holding that the D.C. Circuit's decision in *ACA International v. FCC*, 885 F.3d 687, 695 (D.C. Cir. 2018), invalidated not only the July 2015 Order of the Federal Communications Commission (the "FCC"), but also the FCC's prior interpretations of the term "ATDS" in its 2003, 2008, and 2012 orders. The *Johnson* Court concluded that "[t]he phrase 'using a random or sequential number generator' applies to the numbers to be called and an ATDS must either store or produce those numbers (and then dial them)." 2018 WL 6426677, at *2. The Court further agreed with the decision in *Pinkus v. Sirius XM Radio*, 319 F. Supp. 3d 927, 935 (N.D. Ill. 2018), that "[c]urated lists developed without random or sequential number generation capacity fall outside the statute's scope." *Id.* The Court expressly rejected the view of the Ninth Circuit's decision in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1049 (9th Cir. 2018)—cited by Plaintiff here—that a device that dials numbers from a stored list (without random or sequential number generation) qualifies as an ATDS. *Id.*

Likewise, the *Thompson-Harbach* Court held that the predictive dialer at issue did not constitute an ATDS. The Court agreed with *Pinkus* and its progeny that *ACA International* invalidated the FCC's 2003 and 2008 orders defining that a predictive dialer is *per se* an "ATDS." *Thompson-Harbach*, 2019 WL 148711, at *10-11. The *Thomson-Harbach* Court rejected the analysis of the statute adopted by *Marks*. *Id.* at *13. Finally, the Court found that defendant did not violate the TCPA by calling plaintiff at the number provided by plaintiff where the defendant's predictive dialer was unable to "randomly or sequentially produce or store a number and then call that number." *Id.* at *14.

The decisions in *Johnson* and *Thompson-Harbach* are instructive and further support the grant of a judgment on the pleadings in favor of NSL.

Dated: January 17, 2019

Respectfully submitted,
ATTORNEYS FOR DEFENDANT

By: /s/ Robert H. Griffith
One of Their Attorneys

Robert H. Griffith
FOLEY & LARDNER LLP
Firm No. 17190
321 North Clark Street, Suite 2800
Chicago, IL 60654-5313
Tel: 312.832.4500
Fax: 312.832.4700
rgriffith@foley.com

CERTIFICATE OF SERVICE

Robert H. Griffith hereby states that on January 17, 2019, he served a copy of **DEFENDANT NAVIENT SOLUTIONS, LLC'S NOTICE OF SUPPLEMENTAL AUTHORITY**, and this Certificate of Service with the Clerk of the Court using the ECF system, which will send notification of such filing on:

Taxiarchis Hatzidimitriadis
Sulaiman Law Group, Ltd.
2500 South Highland Ave., Suite 200
Lombard, IL 60148
thatz@sulaimanlaw.com

/s/ Robert H. Griffith
Robert H. Griffith
FOLEY & LARDNER LLP
321 North Clark Street, Suite 2800
Chicago, IL 60654-5313
rgriffith@foley.com
Telephone: 312.832.5174
Facsimile: 312.832.4700